Supreme Court, U.S.
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No. 02 141

In the

Supreme Court of the United States

In Re: ANN MARIE WALTER,
Debtor

SILVIO GIANNETTI;
GIANNETTI INVESTMENT COMPANY,

Petitioners,

v.

JERRY PRUZINSKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DID THE CIRCUIT COURT ERR IN GRANTING RELIEF UNDER F. R. CIV. P. 60(A) IN A CASE WHEREIN RESPONDENT'S COUNSEL ADMITS HE MADE A MISTAKE IN APPROVING AN ORDER AS TO FORM AND CONTENT AND MORE THAN 12 MONTHS LAPSE BETWEEN ENTRY OF THE ORDER AND FILING OF A MOTION TO CORRECT THE MISTAKE?

SHOULD THE COURT GRANT THE PETITION FOR WRIT OF CERTIORARI?

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IN THE
SUPREME COURT OF THE UNITED STATES

SILVIO GIANNETTI AND GIANNETTI
INVESTMENT COMPANY
PETITIONERS

V.

JERRY PRUZINSKY
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SILVIO GIANNETTI and Giannetti Investment Company, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This matter is on before the Court on Petioners' Petition for a Writ of Certiorari to the Sixth Circuit following that Circuit's reversal of a District Court judgment reversing a Bankruptcy Court order. The Sixth Circuit opinion is reported at ELECTRONIC CITATION 2002 Fed. App. 0078P (6th Cir.)

Both the District and Bankruptcy Court's opinions were unreported. The case centers on construction of F.R.Civ.P.60.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction of this matter is based upon 28 U.S.C. Sec. 158 and is a PETITION FOR A WRIT OF CERTIORARI to the Sixth Circuit Court of Appeals from an appeal of right taken from an opinion and order of the Bankruptcy Court dated

March 06, 2000 and the U.S. District Court reversal of the Bankruptcy Court on August 15,2000. The Bankruptcy Court further ruled (R.437,P.7, J.A.90) that appellant had consented to jurisdiction of the issue by approving the order as to "form and content" after a hearing on his objections to the order.

RELEVANT PROVISIONS INVOLVED

28 U.S.C. Sec. 158:

> (a) The district courts of the United States shall have jurisdiction to hear appeals (FOOTNOTE 1)
>
> (FOOTNOTE 1) So in original. Probably should be followed by a dash.
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.
>
> An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
>
> (b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that -

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial

councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless -

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

F.R.CIV. P. 60 (a) and (b):

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

> or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Ann Marie Walter, debtor, was formerly married to Jerry Pruzinsky, Respondent. Prior to the filing of the bankruptcy petition, Petitioner Giannetti, debtor's father and Respondent Pruzinky's ex- father-in-law, had obtained a Default Judgment against debtor and Pruzinsky in Wayne County Circuit Court in Michigan for approximately $630,000.00. Giannetti's complaint in state court alleged that both debtor and Respondent, Pruzinsky, had embezzled security deposits belonging to tenants of an apartment complex owned by one of the Giannetti companies and managed by debtor and Respondent during their marriage. In addition, they were alleged to have converted funds entrusted to them by Mr. Giannetti. After further state court proceedings, the parties entered into a settlement agreement, the Wayne County Agreement of 12/06/94.

Under the terms of the Wayne County Agreement of 12/06/94, the debtor and Respondent quit claimed their interests in certain real property to Giannetti and surrendered stocks they owned in certain Giannetti companies. The Wayne County Agreement of 12/06/94 further provided that each side retained "contingent liens" in properties owned by the other pending a valuation process whereby the transferred properties were to be appraised and the determined values set-off against the default judgment plus interest owed to Giannetti. Prior to completion of the state court's valuation process under the the Wayne County Agreement of 12/06/94, Debtor Walter filed her bankruptcy petition automatically staying any proceedings in state court.

Giannetti filed a timely claim against Walter's bankruptcy estate for satisfaction of the Wayne County Agreement of 12/06/94. Although Giannetti felt his claim was worth approximately $350,000.00, he was tired of the seven years of litigation, and reached an agreement (the Federal Agreement) with the Trustee to settle this claim for $100,000.00 plus a full release as to all parties of the 12/06/94 Wayne County agreement. Giannetti and the Trustee incorporated the Federal Agreement in a proposed order, and the Trustee applied to the Bankruptcy Court for permission to enter into the agreement. Respondent Pruzinsky, an unsecured creditor of the estate, objected. His written objection (R.306, J.A.70) read in full as follows:

> "Now comes Jerry Pruzinsky, creditor in the above captioned matter and objects to the entry of the proposed order approving settlement and particularly the final paragraph of the same for the reason that this paragraph seeks to adjudicate matters not before this Court. (a dispute between these parties which is pending in the Wayne County Circuit Court#.: 92-230961-CK).

The proposed order read in relevant part as follows (the parties and the Bankruptcy Court referred to these two

paragraphs as paragraphs 3 and 4):

> "IT IS FURTHER ORDERED that the Wayne County Circuit Court Default Judgment obtained by Claimants [Giannetti] against the Debtor, Anna Marie Walter and her ex-husband, Jerry Pruzinsky, which Default Judgment dated October 25, 1993, and having been entered in the Wayne County Circuit Court Case bearing case number 92-230961-CK, as well as a certain Settlement Agreement and Order of the Wayne County Circuit Court dated December 06, 1994, having been entered into by the same parties, are hereby satisfied and forever discharged.
>
> IT IS FURTHER ORDERED that any contingent liens by the debtor and/or her ex-husband, Jerry Pruzinsky, arising under the Wayne County Settlement and Order... as(sic) hereby released, discharged and void." (R.303, J.A.69).

At a hearing held before Judge Shapero in the Bankruptcy Court on March 27, 1998, the court heard Respondent Pruzinsky's objections to the Federal Agreement. Bankruptcy Judge Walter Shapero first attempted to clarify what the objection was, before delving into the reasons for it. The following exchange took place.

> "THE COURT: Well, we're talking now about the last paragraph only of the proposed order; am I right, Mr. Fellrath?
>
> MR. FELLRATH: That's correct. We do not object to the settlement for $100,000.00, which would give the creditor a $100,000.00 claim against the estate. We do not object to that.

THE COURT: All right.

MR. FELLRATH: What we object to is the language in that order which - the proposed order, that Mr. Giannetti -the claims of Mr. Pruzinsky (sic) against Mr. Giannetti are released, discharged and void. The claims of an unrelated debtor, or her assets, which have no direct or substantial impact on the estate, should be dismissed, according to the case of In matter of: TVOR–

THE COURT: If the words- Mr. Fellrath-

MR. FELLRATH: Yes.

THE COURT: – if the words, looking now at the proposed order, now–do you have it in front of you?

MR. FELLRATH: Yes, your Honor, I do.

THE COURT: If the words "and/or her ex-husband, Jerry Pruzinsky" (sic) so I understand what you're saying were eliminated from the Order, would that solve your problem?

MR. FELLRATH: Yes, your honor. The..the..the.. reference to my client should be deleted from that portion of the order.

THE COURT: All right. Specifically, would that do the trick from your perspective?

MR. FELLRATH: Yes. Yes.

THE COURT: So, that's what you're concerned about?

MR. FELLRATH: That's what I'm concerned about

(R.371, Transcript 3/27/1998 at 8-9,J.A.112-113).

After hearing from counsel for the Trustee and for Petitioner Giannetti, the Court heard counsel for Respondent Pruzinsky on the basis for the objection. Counsel for Mr. Pruzinsky contended that as he had not taken part in the negotiations leading up to the Federal Agreement, and that as he was engaged in litigation with Mr. Giannetti in Wayne County, and was attempting a "Global Settlement" the contingent lien was a 'chip' he had not yet bargained away. (R.371, transcript 3/27/98 at 11-12. J.A.115-116) Judge Shapero concluded that he could not sign an Order 'including language which, in effect, gives up rights, frankly'. and held that he would sign an order "excising the language I was talking about, the words "and/or her ex-husband, Jerry Pruzinsky." Counsel for the Trustee then stated he would present the modified Order for entry.

After counsel for Mr. Giannetti, Mr. Pruzinsky, and the Trustee had previously signed the modified Order "approved as to Form and Content", the modified Order was presented to and signed by the Bankruptcy Court on April 20, 1998 (R.319,J.A.71). Nothing, however, relating to Mr. Pruzinsky was struck in the third paragraph. As entered, the modified Order only struck the reference to Mr. Pruzinsky's contingent lien in the fourth paragraph.

As entered, the third paragraph stated that the Wayne County Default Judgment and the 12/06/94 Wayne County settlement agreement were satisfied and forever discharged by the same parties as the parties to the Order. Nothing further occurred, either in the bankruptcy court or the state court between Giannetti and Pruzinsky until August of 1999. In the interim period, however, After two separate title companies looked at the 4/20/98 order, and 'cleared it' of Pruzinsky's lien, Giannetti invested millions in development of the parcel.

In August 1999,Respondent Pruzinsky filed subpoenas in state court and a motion to determine the values of transferred properties. Petitioner Giannetti responded by pointing to the third paragraph of the modified entered order in the Bankruptcy Court and contended that the provisions of the order declaring the Wayne County agreement between the same parties "satisfied and forever discharged" barred any further proceedings. This state court motion was never brought on for hearing. Instead, Pruzinsky filed a "Motion to Clarify" the April 20, 1998 modified order before the Bankruptcy Court.

On December 17, 1999, Judge Shapero heard the "Motion to Clarify". The Court construed Pruzinsky's motion as one seeking relief from a Judgment pursuant to Federal Bankruptcy Rule 9024 and F.R.Civ.P. 60(b). Pruzinsky argued that he was entitled to relief under parts (1), (4), and (6)of Rule 60(b). On March 06, 2000, the Bankruptcy Court issued its Opinion and Order finding that Rule 60 (b)(1) regarding mistake, did not apply because motions under that portion are subject to a strict one year time limit and that Respondent had failed to seek relief for 19 months (R.437,p.7, J.A.84).

It is conceded in the March 06, 2000 opinion and order of Bankruptcy Judge Shapero that more than 12 months lapsed between the time the 04/20/98 order was entered and relief from the order was sought (R.437, p.3-4 J.A., 86-87). In fact, at the December 17, 1999 bankruptcy hearing below, Mr. Fellrath, Respondent's counsel, stated on the record that he had made a mistake, and that more than 12 months had elapsed before any action was taken. R.449, 12/17/99 transcript, p. 11, L. 16-18: J.A.128:

> "THE COURT: So what are you saying, you made a mistake?
>
> MR. FELLRATH: Yes." (emphasis added)
>
> "THE COURT: Here you have an order— here you have an order that–arguably on its fact

> (sic) is at odds with what we talked about. Yet you signed it, and then you wait 14 or 15 months?
>
> MR. FELLRATH: uh-huh. I understand that, and I was told at the–the–I looked at the order. I thought it was–it was okay. But I didn't catch the nuance here that this –and– and I still look at it, and I still say, well, all it says is that it's settled....p.28 12/17/99 R.449, J.A.145

However, the Bankruptcy Court found that the residual clause of the Rule, F. R.Civ.P.60(b)(6) applied. Although the Bankruptcy Court acknowledged Sixth Circuit precedents holding that part (6) of Rule 60 (b), and parts (1)-(5) were "mutually exclusive" the court held that "something more" than those grounds was present, and granted relief under (6); (R.437,p. 8-10 J.A.91).

The 'something more' Judge Shapero claims is present is that his intentions were not reflected in the modified order entered 4/20/1998, and that this arises to 'exceptional or extraordinary'.

The Bankruptcy Court held as follows:

> " The sum and substance of the matter is that either (1) the third paragraph of the Order should be construed as not pertaining to the contingent lien and the valuation process bound up with that lien, or (2) if the parties and any other interested persons or any other Court wishing to understand the purport and meaning of the Order need clarification, that clarification is that the Order should be construed as having preserved to Pruzinsky his referred to contingent lien, together with whatever obligations that might arise under paragraph 15 of the Wayne County settlement

> agreement, which that contingent lien was there designed to secure. The amount, if any, of any such obligation or any other defenses thereto, is for the state court to determine- the purposes of this opinion being solely to make clear that the Order of this Court should not be construed to preclude that process from going forward. (R.437,p.10, J.A.93)

Giannetti filed a timely appeal to the District Court, contending that Rule 60 (b) (6) did not apply to the facts.

On August 15, 2000, District Court Judge Borman reversed the Bankruptcy Court,stating:

> ... "The Sixth Circuit "adheres to the view that courts should apply Rule 60 (b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." [Citing Hopper v. Euclid Manor Nursing Home, Inc. 867 F 2d 291, 294) (6th CA. 1989).] A claim of strictly legal error is a claim of "mistake" governed by Rule 60 (b)(1), and thus is not cognizable under Rule 60 (b)(6). District Courts may use subsection 60 (b)(6) to achieve substantial justice when "something more" than one of the grounds listed in the first five clauses is present. Id....
>
> Appellant [Giannetti] argues that the claim of error made by Pruzinsky is one of garden variety mistake. The legal document involved here was relatively brief. The language was clear. Any mistake was made by counsel for Pruzinsky and adopted by the Bankruptcy Judge at his request.
>
> Pruzinsky objected, specifying that the final paragraph of the proposed order

purported to destroy his contingent lien on Giannetti's property, despite the fact that he had not consented to relinquish that lien.

Pruzinsky couched his objection repeatedly as being to the final paragraph only, and the Bankruptcy Judge accordingly focused its attention there.

Pruzinsky did not deal with the third paragraph which, by declaring the Wayne County agreement satisfied and discharged, might also have the effect of destroying the contingent lien (i.e. by preventing the contingency triggering the lien- valuation of the property- from ever coming to pass). The Bankruptcy Court dealt with Pruzinsky's objection; it was not the obligation of the Bankruptcy Judge to peruse and rewrite the entire document.

Counsel for Pruzinsky, in reality, recognizes that the April 20, 1998 order embodied a mistake. The Bankruptcy Judge's on- the-record discussion, that he could not endorse an agreement terminating Pruzinsky's rights when Pruzinsky had arguably not been involved in negotiating the agreement (and objected to it) was inconsistent with the Order which did not address the third paragraph. This order of the Bankruptcy Court, in view of its discussion of the issue at the hearing of March 27, 1998 (at page 13) was, in that Court's view, more than a mistake,-"something more" that justified the extraordinary relief granted in the March 6, 2000 order.

This Court disagrees with that conclusion. The April 20, 1998 order of the Bankruptcy Judge conformed to the request of

Pruzinsky's counsel and to the specific oral holding of Judge Shapero, which was that the words "and/or her ex-husband, Jerry [Pruzinsky]" be excised from the proposed order. Those exact words occurred only once in the proposed order- in the final paragraph- and they were deleted there. The third paragraph was never mentioned at the hearing. That third paragraph contains similar, but not identical words – "or'" was missing from that paragraph's version of the offending phrase. Thus, the April 20, 1998, order specifically conformed to Judge Shapero's holding.

The mistake places the case squarely within Rule 60(b)(1). To the extent that extinguishing Pruzinsky's rights, despite his lack of involvement in the settlement negotiations, constituted legal error, that too falls under Rule 60(b)(1). The case is governed by Rule 60 (b)(1), and subject to its strict one-year time limit for the filing of a motion for relief from judgment. Because Pruzinskys motion was filed some 19 months after the order from which relief was sought, the Bankruptcy Judge had no discretion to grant the relief he did in the March 06, 2000 order.

In essence, counsel for Pruzinsky wants this Court to affirm the Bankruptcy Judge's latest order, that, without Appellant's approval, rewrote the contract as effectuated by the mutually agreed upon Bankruptcy Order. It is not the court's role to rewrite a contract.

(R.13, p.10-11, J.A.12-14)

A Judgment of reversal was filed on August 17, 2000 (R.14 J.A.15) and Pruzinsky filed a timely appeal.

On March 04, 2002, after hearing oral argument on November 28, 2001, the Sixth Circuit majority reversed the District Court, pursuant to F. R. Civ. P. 60 (a), finding that the case involved a ministerial mistake on the part of both Respondent and the Bankruptcy Judge. However, Citing Olle v. Henry & Wright Corp., 910 F. 2d 37, 363-64, Judge Nelson dissented, on the grounds that the Sixth Circuit had adopted caselaw from other jurisdictions that errors that affect substantial rights of the parties are outside the scope of rule 60(a). In addition, the dissent was not persuaded that the original error was a mere "clerical mistake."

A Petition for Rehearing en Banc followed and was denied April 25, 2002, again over dissent of Judge Nelson. This Petition followed.

REASONS FOR GRANTING WRIT

This case involves interpretation of F.R. Civ. P. 60. To date, 5 judges have reviewed the matter, with three ruling in favor of Respondent, and two in favor of Petitioner: The Bankruptcy Judge, citing F.R. Civ. P. 60(b)(6) ruled in favor of Respondent; The District Court reversed, stating that a mere mistake was involved and that the case clearly fell within F.R. Civ. P. 60 (b)(1) and was time barred; The Majority in the Sixth Circuit in turn reversed the District Court utilizing F.R. Civ. P. 60(a) and the dissent at the Sixth Circuit contends that F.R.Civ. 60(a) did not apply as the matter affected the substantive rights of the parties and, contrary to the majority, did not involve a mere clerical mistake. It is therefore clear that at least among the Judges involved here, the matter is subject to some confusion and an edict from this Court on these facts would be a guide to lawyers and Judges in cases involving F.R.Civ.P. 60 in the future.

This is particularly true as the issue involved here, the limits of the power of a judge to change its ruling long after-in this

case 18 months- it has been made. Can F.R.Civ.P. 60(a) be used, even in a case where counsel has admitted a mistake, 18 months after an order has been entered and in reliance on said order a party has invested millions in a project? If so, then there would appear to be no limits on the application of F.R. Civ. P. 60(a) to any facts, and this would seriously undermine the finality aspect to all court rulings.

What is the greater public policy under F.R. Civ. P. 60, the finality of decisions or the power of judges to overrule what is later viewed to be, even after an admitted mistake, an unjust result?

Federal Rule 60 in fact embodies two somewhat competing interests, the finality interest and the power of a court to overturn a decision later viewed as unjust. Rules 60 (b) 1,2, and 3 clearly favor the finality interest as the ability to overturn a ruling for the reasons embodied in those sections of the rule are subject to a strict 1 year time limit. In a case where such a rule applies do the courts still retain the power, under 60 (a), to negate the finality interest in 60 (b) 1, 2 and 3 by utilizing 60 (a)? If so, it would seem that in our system of justice we are allowing what will be arbitrary decisions to supplant the rule of law. As shown in this case, 5 judges have produced 4 different results. Both the bench and bar would benefit from a pronouncement from this August Court on the relationship between these two sections of the Federal Rules and the competing public policies behind them.

CONCLUSION

For the foregoing reasons, the writ should be granted.

RESPECTFULLY SUBMITTED,

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Attorneys for Petitioners

(Any footnotes trail the end of each document.)
No. 00-2075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: ANNA MARIE WALTER,
Debtor.

JERRY PRUZINSKY, Defendant-
Appellant,

v.

SILVIO GIANETTI; GIANETTI
INVESTMENT COMPANY,
Plaintiffs-Appellees.

November 28, 2001, Argued

March 4, 2002, Decided

March 4, 2002, Filed

COUNSEL:
ARGUED: Richard F. Fellrath, LAW OFFICE OF RICHARD F. FELLRATH, Detroit, Michigan, for Appellant.

Jerry L. Watson, Bloomfield Hills, Michigan, for Appellee.

ON BRIEF: Richard F. Fellrath, LAW OFFICE OF RICHARD F. FELLRATH, Detroit, Michigan, for Appellant.

Jerry L. Watson, Bloomfield Hills, Michigan, for Appellee.

JUDGES:
Before: JONES, NELSON, and DAUGHTREY, Circuit Judges. JONES, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. NELSON, J., delivered a separate dissenting opinion.

OPINIONBY:
NATHANIEL R. JONES

OPINION:

NATHANIEL R. JONES, Circuit Judge. Appellant Jerry Pruzinsky appeals the district court's determination that his Motion for Clarification of Judgment, construed as one seeking relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), was barred by the one-year statute of limitations contained therein. We reverse the judgment of the district court and remand for further proceedings.

I. BACKGROUND

A. The Wayne County Agreement

The debtor, Anna Marie Walter, was formerly married to the appellant, Jerry Pruzinsky. Before the bankruptcy proceedings commenced, the appellee, Gianetti, obtained a default judgment against Walter and Pruzinsky in the Wayne County Circuit Court for $ 629,400. Gianetti's complaint alleged that Walter and Pruzinsky embezzled funds belonging to several of Gianetti's companies. The parties entered into a settlement agreement in satisfaction of the judgment (the "Wayne County Agreement"). Under the terms of the agreement, Walter and Pruzinsky surrendered their interest in certain real property to Gianetti. The agreement further provided that each side retained a contingent lien. This aspect of the agreement provided that the parties would have the real property appraised. If the value of the property exceeded the value of the debt owed to Gianetti, then Gianetti was to refund the difference to Walter and Pruzinsky. Conversely, if the property value was insufficient to satisfy the debt owed to Gianetti, then Gianetti would have a lien on all other assets owned by Walter and Pruzinsky. The Wayne County Circuit Court entered an order on December 6, 1994 incorporating the terms of the Wayne County Agreement.

B. The Federal Agreement

Prior to the completion of the valuation process called for in the Wayne County Agreement, Walter filed her bankruptcy petition in the bankruptcy court, which automatically stayed the proceedings against her in the Wayne County action. When he received notice of this action, Gianetti pursued in the bankruptcy court his claim against the Walter estate for the unsatisfied judgment. The trustee in bankruptcy subsequently reached an agreement with Gianetti to settle the claim (the "Federal Agreement"). Walter and Pruzinsky were divorced at the time she initiated the bankruptcy proceedings. Therefore, Pruzinsky was neither a party to nor did he participate in the negotiation of this agreement. Pruzinsky was, however, like Gianetti, a creditor of the Walter bankruptcy estate and, as such, was entitled to receive notice of the proposed settlement. After receiving notice, Pruzinsky filed a written objection to certain language in the proposed order which Gianetti and the trustee had drafted to settle the claim. The objection stated:

Now comes Jerry Pruzinsky, creditor in the above captioned matter and objects to the entry of the proposed order approving settlement and particularly the final paragraph of the same for the reason that this paragraph seeks to adjudicate matters not before this Court (a dispute between Jerry Pruzinsky and Silvo Gianetti concerning claims between these parties which is pending in the Wayne Country Circuit Court # 92-230961-CK).

Objection To Entry Of Order Approving Settlement. February 12, 1998. J.A. at 70 (emphasis added). The proposed order, memorializing the Federal Agreement between Gianetti and the trustee in bankruptcy, read in relevant part as follows (the parties refer to these two paragraphs as "paragraphs three and four"):

It is further ordered that the Wayne County Circuit Court Default Judgment obtained by [Gianetti] against Debtor Anna Marie Walter and her ex-husband, Jerry Pruzinsky . . . as well as a certain Settlement Agreement Order of the Wayne

County Circuit Court . . . are hereby satisfied and forever discharged.

It is further ordered that any contingent liens by the Debtor and/or her ex-husband Jerry Pruzinsky, arising under the Wayne County Settlement and Order . . . [are] hereby released, discharged, and void.

Order Approving Settlement of Secured Claim. April 20, 1998. J.A. 71-72 (emphasis added).

C. The April 1998 Order

At a hearing on March 27, 1998, the bankruptcy court heard Pruzinsky's objections to the Federal Agreement. Pruzinsky explained that he was not a party to the Federal Agreement and that he did not participate in the negotiations that produced the proposed order. He further explained that the proposed order drafted by Gianetti and the bankruptcy trustee purported to extinguish his right under the Wayne County Agreement to a refund if the appraised value of the property exceeded the value of the debt owed to Gianetti. Pruzinsky maintained that it was unfair to allow the bankruptcy trustee and Gianetti to bargain away his rights when he was not a party to their agreement. The following exchange took place:

MR. FELLRATH [Counsel for Pruzinsky]: The order . . . provides that contingent claims and liens by Jerry Pruzinsky against the letter [sic] - - excuse me, against the lender - - are released, discharged and void. My client objects to that language.

THE COURT: Well, we're talking now about the last paragraph only of the proposed order; am I right, Mr. Fellrath?

MR. FELLRATH: That's correct . . . .

THE COURT: All right.

MR. FELLRATH: What we object to is the language in that order which - - the proposed order, that Mr. Gianetti - -the claims of Mr. Pruzinsky against Mr. Gianetti are released, discharged and void . . . .

THE COURT: If the words - - Mr. Fellrath - -

MR. FELLRATH: Yes.

THE COURT: - - if the words, looking now at the proposed order, now- - do you have it in front of you?

MR. FELLRATH: Yes, your Honor, I do.

THE COURT: If the words "and/or her ex-husband, Jerry Pruzinsky" - - so I understand what you're saying - - were eliminated from the order, would that solve your problem?

MR. FELLRATH: Yes, your Honor. The - - the - - the reference to my client should be deleted from that portion of the order.

THE COURT: All right. Specifically, would that do the trick from your perspective?

MR. FELLRATH: Yes. Yes.

J.A. at 111-13 .

At this point in the hearing, Mr. Watson, counsel for Gianetti, objected to the request to delete the reference to Pruzinsky. He argued that it was fair to dissolve Pruzinsky's contingent lien because the terms of the Federal Agreement released Pruzinsky from liability in the event the appraised value of the property was not enough to satisfy the amount owed Gianetti under the default judgment. The bankruptcy court rejected this argument.

THE COURT: How can - - how can the Debtor and yourself, between the two of you, eliminate Mr. Pruzinsky's rights?

MR. WATSON: Well, because we are also releasing him from any liability under the settlement . . . .

. . .

THE COURT: All right. So I don't see how I can include language in there which, in effect, gives up rights, frankly. So I will sign an order that excises from the proposed order the language I was talking about, the words: 'And/or her ex-husband Jerry Pruzinsky.' I'll sign that order.

J.A. at 114, 117.

D. The Motion for Clarification

The important point to observe from the foregoing exchange is that while the bankruptcy court intended to fully preserve Pruzinsky's rights under the Wayne County Agreement, the settlement order, as modified by the bankruptcy court, does not reflect that intent. It is clear from the record that the objective of the modification was to remove Pruzinsky from the force of the order. This, however, was accomplished only with respect to paragraph four, as Pruzinsky mistakenly told the bankruptcy court that his objection lay only with that section of the order. The April 1998 order of the bankruptcy court did not remove the reference to Pruzinsky in paragraph three. Instead, paragraph three of the order continued to declare that the Wayne County Agreement was fully satisfied and discharged and therefore Pruzinsky's contingent lien was dissolved.

The oversight came to a head in August 1999, when Pruzinsky filed subpoenas in Wayne County Circuit Court to determine the value of property included in the Wayne County Agreement. Gianetti raised the bankruptcy court's April 1998 order as a defense, pointing to paragraph three, the provision of the order stating that, as to Pruzinsky, the Wayne County Agreement was satisfied and forever discharged. The Wayne County Circuit Court, for some reason that remains unexplained, adjourned all motions. [n1] Pruzinsky then filed a "Motion to Clarify" the April 1998 order with the bankruptcy court, contending that the April 1998 order did not bar his

action in Wayne County, and sought an order from the bankruptcy court to that effect.

The bankruptcy court construed Pruzinsky's Motion to Clarify as one seeking relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. [n2] Rule 60(b) authorizes a court to relieve a party from a final judgment or order in the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b)(1)-(6).

Pruzinsky argued that he was entitled to relief under subparts (1), (4), and (6) of Rule 60(b). After a hearing, the bankruptcy court concluded that Rule 60(b)(1), regarding mistake, did not apply because motions under that section are subject to a strict one-year time limit that Pruzinsky did not meet. Similarly, the court concluded that 60(b)(4), relating to void judgments, also did not apply. The court found, however, that Rule 60(b)(6) was applicable in the present controversy. The court acknowledged circuit precedent holding that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the rule. See Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989) ("Courts may employ subsection (b)(6) as a means to achieve substantial justice when 'something more' than one of the grounds contained in Rule 60(b)'s first five clauses is present."). The bankruptcy court held that "the fact that the Order failed to give effect to the court's intent is 'exceptional or extraordinary,' and provides the 'something more' than mere mistake on the part of counsel. " J.A. at 91. Consequently, the bankruptcy court granted Pruzinsky's motion for clarification and held that "[the] clarification is that the Order should be construed as having preserved to Pruzinsky his referred to contingent lien, together with whatever obligation that might arise under . . . the Wayne County Settlement Agreement, which that contingent lien was there designed to secure." J.A. at 93.

Gianetti filed an appeal in the United States District Court for the Eastern District of Michigan. The district court disagreed with the bankruptcy court's conclusion that the order embodied something more than a mere routine mistake of counsel and held that the extraordinary relief granted under Rule 60(b)(6) was improper. Finding that the discrepancy in the order was due to a simple mistake on the part of counsel, the district court concluded that the applicable rule was Rule 60(b)(1), and held that relief under 60(b)(1) was precluded because more than one-year had expired since the April 1998 order was entered. We must decide on appeal whether Rule 60 authorized the bankruptcy court to amend the April 1998 order by striking the second reference to Pruzinsky and thereby preserving his contingent lien.

II. DISCUSSION

The facts of this case and the relevant legal authorities suggest that both courts committed error in their application of Rule 60. We review the denial of appropriate relief under Rule 60 for abuse of discretion. Kocher v. Dow Chemical Co., 132 F.3d 1225, 1229 (8th Cir. 1997). "A clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based." Ohlander v. Larson, 114 F.3d 1531, 1537 (10th Cir. 1997).

A. Rule 60(b)

The district court was correct in finding unpersuasive the bankruptcy court's conclusion that the discrepancy in the order was sufficiently exceptional or extraordinary to trigger the application of Rule 60(b)(6). The district court correctly observed that:

There are few cases elaborating on the 'something more' that is required. This may be explained, as the Sixth Circuit has postulated, by the fact that clauses 1-5 of the Rule cover almost every conceivable ground for relief. The 'something more,' then, must include unusual or extreme situations

where principles of equity mandate relief. The question in this case is whether such equitable circumstances are present.

J.A. at 12 (citation omitted). Indeed, no special circumstances were present in this case to implicate Rule 60(b)(6). Nevertheless, the district court incorrectly concluded that the problem here was simply a matter of attorney error, such that Rule 60(b)(1) applied. Instead, the record shows that the discrepancy in the order resulted from the mistake of counsel and the bankruptcy court's own oversight. The on-the-record discussion of the bankruptcy court clearly reveals that it intended to remove Pruzinsky entirely from the force of the April 1998 order. It expressly said so. The simple fact is that the court struck only one reference to Pruzinsky instead of two. This amounts to a clerical error of the type governed by Rule 60(a).

B. Rule 60(a)

Rule 60(a) provides, in relevant part, that "clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party . . . ." Fed. R. Civ. P. 60(a). A good number of legal authorities offer guidance on the application of Rule 60(a). The basic purpose of the rule is to authorize the court to correct errors that are mechanical in nature that arise from oversight or omission. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2854, at 240 (2d ed. 1995). Clerical mistakes include those made by judges as well as ministerial employees. Blanton v. Anzalone, 813 F.2d 1574, 1577 (9th Cir. 1987). The rule does not, however, authorize the court to revisit its legal analysis or otherwise correct an "error[] of substantive judgment." Olle, 910 F.2d at 364 (6th Cir. 1990). One court has aptly noted that:

The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its

original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Blanton, 813 F.2d at 1577 n. 2 (citation omitted) (emphasis in original). Stated differently, a court properly acts under Rule 60(a) when it is necessary to "correct mistakes or oversights that cause the judgment to fail to reflect what was intended at the time of trial." Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 689 (11th Cir. 1987). In that regard, when a court has undertaken to "make the judgment or record speak the truth" rather than "something other than what was originally pronounced" the court has not abused its discretion in granting relief under Rule 60(a). Id.

We have upheld the correction of errors under Rule 60(a) in various circumstances that support the application of the rule here. In Pogor v. Makita U.S.A. Inc., 135 F.3d 384 (6th Cir. 1998), the district court, in a products liability action, entered judgment in accordance with a jury verdict for the plaintiffs for $ 1,352,400 plus statutory interest. The district court, however, omitted from the judgment the specific amount of prejudgment interest to which the plaintiffs were entitled. In light of the fact that, by the terms of its earlier order, the district court intended to award prejudgment interest, we held, over the defendant's objection, that supplying the missing information was a simple "ministerial task" permissible under Rule 60(a). Id. at 388. In Whitaker v. Associated Credit Services, Inc., 946 F.2d 1222 (6th Cir. 1991), the defendant intended to extend an offer of settlement of $ 500; however, due to a typographical error, the offer transmitted to the plaintiffs was $ 500,000. The plaintiffs delivered a notice of acceptance to the clerk of the district court, who subsequently entered judgment for $ 500,000 in favor of the plaintiffs. We held that modification of the award was appropriate under either Rule 60(a) or 60(b)(1) on the ground that "the mistake was more than a wrongful assessment of the value of the case; it was a pure typographical error." Id. at 1226.

It follows then from what we have said that the bankruptcy court was entitled to modify its order under Rule

60(a) if: (i) the error was mechanical in nature rather than the result of a deliberate choice, and (ii) the modification corrects the April 1998 order such that it reflects what was the intent of the bankruptcy court at the time of the hearing. In granting Pruzinsky's motion for clarification, the bankruptcy court made it clear that the original order was at odds with what the court intended to accomplish at the hearing. It stated that:

> the Court is concerned, not simply because Pruzinsky was possibly mistaken as to the adequacy of his suggested correction, but that the Order as eventually presented and signed did not fully and properly reflect the intent of the Court . . . . The Court specifically stated that the words 'and/or her husband Jerry Pruzinsky' were to be excised from the Order and they were not.
>
> J.A. at 90 (emphasis in original).

The bankruptcy court explained that, read together, the language of paragraphs three and four did not make sense.

> When one considers the rationale of the Court's ruling, i.e., that without Pruzinsky's consent, the Court could not force him to compromise any rights he might have, the face of the Order contains an inconsistency.
>
> . . .
>
> The sole issue at the hearing on the entry of the Order was that Pruzinsky wished to retain his contingent lien, so that he, at some appropriate point in the future, could complete the valuation process and be refunded the difference (assuming that the property was valued higher than the judgment amount).
>
> . . .
>
> [The inconsistency] arises from the fact that on one hand, the Order as finally entered in the fourth paragraph in effect

preserved the contingent liens of Pruzinsky (by eliminating the reference to him in the suggested Order), but on the other hand, seemingly satisfying and discharging [in the third paragraph] the very and only claim (the valuation process) that could give rise to the referred to contingent lien.

J.A. at 88-89 (emphasis in original).

The bankruptcy court acknowledged Pruzinsky's mistake and its own oversight but proceeded to the erroneous conclusion that together the errors created the exceptional or extraordinary circumstances that justify relief under Rule 60(b)(6). To the contrary, the error in this case was simple: the bankruptcy court struck only one reference to Pruzinsky in the April 1998 order instead of two. The bankruptcy court states in clear and unequivocal language that it intended to remove Pruzinsky entirely from the force of the order, and that the order, as modified, did not reflect that intent. The district court should have permitted this error to be corrected pursuant to Rule 60(a). Gianetti suffers no prejudice because the relief currently sought by Pruzinsky is the very same relief that would have been granted in April 1998, but for the unfortunate oversight of Pruzinsky and the bankruptcy court. The outcome would doubtless be different had we to venture outside the record to identify what the bankruptcy court intended to accomplish at the hearing. See Olle, 910 F.2d at 363 ("The need to consider evidence outside the record is some indication that the error involved is not merely clerical."). That is not the case here. The error is manifest on the face of the record and should be corrected pursuant to Rule 60(a).

III. CONCLUSION

The discrepancy in the April 1998 order calls for a completely ministerial act on the part of the bankruptcy court to modify the order so that it accurately reflects the court's stated intent at the time of the hearing. This type of relief is permissible under Rule 60(a). We therefore reverse the order of the district court and remand for further proceedings consistent with this opinion.

Footnotes

n1 The district court noted that it does not appear on the record whether the Wayne County Circuit Court agreed with Gianetti's defense on the merits, or if it was simply holding the matter in abeyance pending clarification from the bankruptcy court on the scope of its April, 1998 order. J.A. at 9 n. 1.

n2 Bankruptcy Rule 9024 makes Rule 60 applicable to cases under the Bankruptcy Code. See Olle v. Henry & Wright Corporation, 910 F.2d 357, 363 n. 5 (6th Cir. 1990).

DISSENTBY:
DAVID A. NELSON

DISSENT:

DAVID A. NELSON, Circuit Judge, dissenting. This is a close case, in my view, but I am inclined to think that the order of the district court ought to be affirmed.

The crucial question, it seems to me, is whether the mistake in the bankruptcy court's original order was one affecting "the substantive rights of the parties." See Olle v. Henry & Wright Corp., 910 F.2d 357, 363-64 (6th Cir. 1990), where we endorsed caselaw from other circuits teaching that the one-year limitations period prescribed in Rule 60(b) applies to a "mistake [that] affects the substantive rights of the parties" (Jones v. Anderson-Tully Co., 722 F.2d 211, 212-13 (5th Cir. 1984)) and further teaching that "errors that affect substantial rights of the parties are outside the scope of Rule 60(a)" (Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)).

The error in Olle, as we pointed out in that case, "certainly affected the rights of the parties in their commercial relationships and other litigation." Olle, 910 F.2d at 364. Rule 60(a) did not provide an avenue of relief in Olle,

we went on to declare, "because substantial rights of the parties are involved and there was no mere clerical mistake nor oversight by the court." Id.

In the case at bar, by the same token, the error "certainly affected the rights of the parties in their commercial relationships and other litigation." As originally entered, the bankruptcy court order discharged both Gianetti's state court judgment against Pruzinsky and the state court order adopting the settlement agreement between Gianetti and Pruzinsky. The settlement order having been "satisfied and forever discharged," in the words of the bankruptcy court order, there was no longer any need for a determination of the value of Gianetti's property under the aegis of the state court; regardless of what the property was worth, the satisfaction of the settlement order meant that Pruzinsky could no longer claim a lien on the property. Two title companies examined the bankruptcy court order and pronounced Gianetti's title clear, we are told, and Gianetti proceeded to spend millions of dollars developing the property. Yet 19 months after entry of its original order, the bankruptcy court was asked to say, in effect, "never mind, Pruzinsky has a contingent lien after all." It would be hard to imagine a scenario more clearly affecting "substantive" or "substantial" rights.

And I am not persuaded that the original error was a mere "clerical mistake." The failure to strike Pruzinsky's name from paragraph three of the proffered order was not the result of a failure by the bankruptcy court properly to act as an amanuensis; it was the result, rather, of the failure of Pruzinsky's lawyer to request that paragraph three be changed. The lawyer was talking "only" about paragraph four, as the bankruptcy court was clearly given to understand, and it was only "that portion of the order" - the portion where Pruzinsky's name was preceded by the compound connective "and/or" - in which a change was requested.

When asked specifically whether deletion of Pruzinsky's name from "that portion of the order" (i.e. paragraph four) would do the trick, Pruzinsky's lawyer responded "Yes. Yes." The lawyer gave express written approval to the "form and

content" of unamended paragraph three, along with amended paragraph four and two other brief paragraphs. This looks to me like the sort of garden variety "mistake" or "inadvertence" covered by Rule 60(b)(1) - and relief from a judgment reflecting such a mistake or inadvertence may only be granted on motion made "within a reasonable time" and "not more than one year" after entry of the order. The error does not look to me like the sort of "clerical mistake" that is, or should be, correctable in perpetuity under Rule 60(a). [n1]

My colleagues on the panel having taken a different view of the matter, I respectfully dissent.

Footnotes

n1 Unlike Whitaker v. Associated Credit Services, Inc., 946 F.2d 1222, 1226 (6th Cir. 1991), I might note, this case does not involve "a pure typographical error" - and unlike Whitaker, my colleagues' contrary conclusion notwithstanding, this is not a case in which we can rest assured that the appellant "suffered no prejudice from the [lower] court's action" in correcting the error. See id. at 1225.

No. 96-40220-WS

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: ANNA MARIE WALTER, Debtor.

JERRY PRUZINSKY,
Defendant-Appellant,

v.

SILVIO GIANETTI, ET AL.,
Plaintiffs-Appellees.

March 6, 2000 filed

OPINION AND ORDER IN RELATION TO
JERRY PRUZINSKY'S MOTION TO CLARIFY

I. Background

This matter is before the Court on creditor Jerry Pruzinsky's ("Pruzinsky") "Motion to Clarify" this Court's order dated April 20, 1998 ("Order"). That Order approved the trustee's proposed settlement of the claims of Silvio Giannetti and Giannetti Investment Co. (collectively "Giannetti") against Debtor's estate. Pruzinsky argues that the Order impermissibly relinquishes his rights under a state court Settlement Agreement and Order. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(13).

Pruzinsky is the ex-husband of Debtor. Giannetti obtained a pre-petition default judgment against Pruzinsky and Debtor, jointly and severally, in Wayne County Circuit Court on October 25, 1993, in the amount of $629,399.98. The parties to that action entered into a Settlement Agreement and Order ("Wayne County Settlement Agreement") on

December 6, 1994, pursuant to that judgment. In partial satisfaction of the judgment, Debtor and Pruzinsky quit claimed their interest in real estate located in Sterling Heights to Giannetti. The Wayne County Settlement Agreement provided that the property was to be valued, and Debtor and Pruzinsky were to retain contingent liens on the property. If the value exceeded the judgment amount, Giannetti was to promptly remit the difference. The valuation process was incomplete at the time Debtor filed her petition for relief on January 8, 1996. The automatic stay barred continuing the state court action against Debtor.

Giannetti filed a claim against Debtor's estate for the unsatisfied judgment. The trustee and Giannetti reached an agreement to settle the claim, The trustee proposed that Giannetti would he given a $100,000 secured claim in return for satisfaction and discharge of the default judgment and the Wayne County Settlement Agreement. The trustee filed a motion on February 2, 1998 for permission to settle the claim, and the motion had attached to it a proposed order that contained the following two paragraphs:

> IT IS FURTHER ORDERED that the Wayne County Circuit Court Default Judgment obtained by {Giannetti} against the Debtor and her ex-husband Jerry Pruzinski [sic], and which Default Judgment is dated October 25, 1993 and having been entered in the Wayne County Circuit Court Case bearing Case No. 92-230961- CK, as well as a certain Settlement Agreement Order of the Wayne County Circuit Court dated December 6, 1994 having been entered into by the same parties, are hereby satisfied and forever discharged.
>
> IT IS FURTHER ORDERED that any contingent liens by the Debtor and/or her ex-husband, Jerry Pruzinski [sic] ,arising under the Wayne County Settlement and Order of December 6, 1994 and having been recorded at liber 27760, pages 851- - 863, Wayne County Records, on real estate

> attached as Exhibit A to this Order as [sic] hereby released, discharged and void.

(Docket # 303 (emphasis added).) Pruzinsky filed an objection to the proposed settlement on February 12, 1998, focusing on the highlighted language in the fourth and final paragraph of the draft order, arguing that it "seeks to adjudicate matters not before this Court." (Objection to Entry of Order, Docket # 306.)

The Court held a hearing on Pruzinsky's objection to the proposed settlement on March 27, 1998, (Pruzinsky attached a transcript of that bearing to his Motion to Clarify, Docket # 417.) When Pruzinsky explained that he objected to the language in the proposed order providing for release of his contingent liens, the Court asked: "Well, we're talking now about the last paragraph only of the proposed order; am I right. ?" Pruzinsky responded: "That's correct. . . What we object to is the language in that order.. - that. - the claims of Mr. [Pruzinsky] against Mr. Giannetti are released, discharged and void?' (Trans. at 7-8.) When the Court specifically asked if Pruzinsky's objection would be resolved if "the words 'and/or her ex-husband, Jerry [Pruzinsky] . . . were eliminated from the order," Pruzinsky answered "Yes." (Trans. at 8-9.) Pruzinsky explained that there continued to be a dispute between Giannetti and Pruzinsky related to Pruzinsky's contingent lien against the property, which depended on the eventual continuation of the valuation process as between Pruzinsky and Giannetti Trans. at 11-12.) Pruzinsky clearly wished to retain his ability to pursue this process and be left out of the settlement between the trustee and Giannetti entirely.

After verifying with counsel for Giannetti that Pruzinsky had no part in the settlement negotiations, the Court agreed that the Order, as proposed by the trustee and Giannetti would relinquish Pruzinsky's rights. The Court stated; "So I don't see how I can include language in there which, in effect, gives up [Pruzinsky's] rights, frankly. So I will sign an order that excises from the proposed order the

language I was talking about, the words: 'And/or her ex-husband Jerry [Pruzinsky].' I'll sign that order?' (Trans. at 13.) The trustee presented the Order, which was signed "approved as to form and content" by counsel for Pruzinsky, with the language that Pruzinsky had objected to omitted from the fourth, but not the third, paragraph. The Court signed the Order on April 20,1998. (Docket # 319,) A copy of the entered Order is attached to this opinion.

Pruzinsky took no affirmative action until September, 1999, seventeen months after entry of the Order, when he filed a motion in Wayne County Circuit Court to enforce the Wayne County Settlement Agreement as to him, in connection with which Pruzinsky wished to continue with the valuation process of the Sterling Heights property in order to determine whether Giannetti owed him any excess over the judgment amount. Giannetti responded to that motion by arguing that Pruzinsky's claims had been settled by order of this Court, i.e. the April 20, 1998 Order, and res judicata and collateral estoppel barred revisiting his claims. On November 16, 1999, Pruzinsky then filed with this Court the "Motion to Clarify" the Order, which is the subject of this opinion.fn1

Pruzinsky now points to the third paragraph of the Order as containing language that impermissibly waives his rights under the state court action. Pruzinsky asks that this third paragraph of the Order be modified to add the words "as between the estate, the debtor and [Giannetti], only, and not as to Jerry Pruzinsky" at the end of this paragraph. Put differently, Pruzinsky's argument is that the offending language should have been removed from both the third and fourth paragraphs of the Order, not just the fourth paragraph. Giannetti objected to Pruzinsky's motion, and the Court held a hearing on the motion. At the conclusion of the hearing the Court took the matter under advisement. The Court has considered the written submissions and oral arguments of the parties in reaching its conclusion.

II. Analysis

Pruzinsky's Motion to Clarify asks for relief from the Order, which allowed a secured claim against Debtor's estate. Fed. R. Bankr. Proc. 9024, and Fed. R. Civ. Proc. 60(b), by incorporation, apply. Pruzinsky argued in his reply brief that he is entitled to relief under Rule 60(b)(4), for a void judgment, and(b)(6), for "any other reason justifying relief." In addition, he also raised mistake under Rule 60(b)(1) at the hearing on his motion. Giannetti opposes any change to the Order, arguing unfair prejudice and laches.

In one way, the Order is inconsistent on its face. The third paragraph deals with whatever rights and obligations Pruzinsky and Debtor had under the Default Judgment and Wayne County Settlement Agreement, which were "satisfied and forever discharged." By failing to excise the reference to Pruzinsky, that paragraph and its ramifications at least are arguably applicable to both Debtor and Pruzinsky. The fourth paragraph addresses the contingent liens reserved in the same Wayne County Settlement Agreement, and states that such were "released, discharged and void," but as to Debtor only, and thus not as to Pruzinsky, as the transcript of the hearing on the matter makes eminently clear. When one considers the rationale of the Court's ruling, i.e., that without Pruzinsky's consent, the Court could not force him to compromise any rights he might have, the face of the Order contains an inconsistency. That is so, unless one concludes that the third paragraph addresses different matters than the fourth paragraph. As to the third paragraph, the parties, including Pruzinsky, agree they do not take issue, even insofar as it effects Pruzinsky, as long as it is clear that the intention and meaning of the Order is that only the matter of the contingent lien afforded Pruzinsky in connection with the valuation issue under the Wayne County Settlement Agreement, was not extinguished by this Court's Order. The parties have no real interest or controversy about the third paragraph, as long as it is construed as not overriding the fourth paragraph insofar as the contingent lien is concerned. Significantly, the contingent lien provided for in the

Settlement Agreement only has reference to, and, arises, and secures, any amounts that might be due Pruzinsky in connection with the valuation issue.

The sale issue at the hearing on the entry of the Order was that Pruzinsky wished to retain his contingent lien, so that he, at some appropriate point in the future, could complete the valuation process and be refunded the difference (assuming that the property was valued higher than the judgment amount). This Court held that the worth "and/or her ex-husband Jerry [Pruzinski]" should be excised, and in fact they were deleted from the fourth paragraph, but similar language was not eliminated from the third paragraph. Giannetti argues that the third paragraph acts to "satisf[y] and forever discharge[]" the default judgment and Wayne County Settlement Agreement, with no limitation that it was only to be satisfied and discharged as to Debtor only and not Pruzinsky. If Giannetti's argument is accepted, the Order contains a facial inconsistency. That arises from the fact that on the one hand, the Order as finally entered in the fourth paragraph in effect preserved the contingent liens of Pruzinsky (by eliminating the reference to him in the originally suggested Order), but an the other hand, seemingly satisfying and discharging the very and only claim (the valuation process) that could give rise to the referred to contingent lien. Pruzinsky responds to this interpretation by arguing that the Order did not reflect the intent of the Court that he should be allowed to pursue valuation of the property and enforce his lien. if there is an inconsistency, normal rules of construction require giving effect to as much of the agreement as possible, and not assuming redundancies. in this case, that would be achieved by not disturbing the third paragraph, and concluding it covers matters other than what the fourth paragraph covers, thus giving full effect to the fourth paragraph's contingent lien and its attendant and necessarily included valuation process.

Pruzinsky argues that the Order is void under Rule 60(b)(4), because it binds him and he was not a party to the settlement between the trustee and Giannetti. However, "[a]

judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2862 at 326-29 (West 1995) (footnotes omitted). Pruzinsky argues that the Court did not have authority to bind him to the settlement between Debtor and the trustee, without his consent. The Court agrees, and that was the basis of the Court's ruling at the March, 1998 hearing. Pruzinsky had standing to object. he in fact objected, and his objections were heard by the Court and found to have merit. However, his attorney signed the Order purporting to reflect the Court's ruling "as to form and content" Thus, Pruzinsky consented to entry of that Order, and accordingly, the Court cannot grant Pruzinsky relief under subsection (b)(4).

As to section (b)(1), the revision of the language of the proposed Order, suggested by Pruzinsky and agreed to by the Court, arguably did not go far enough. Pruzinsky was arguably mistaken that his requested change to paragraph four was sufficient to address his objection. A motion for relief based on "mistake" is governed by Rule 60(b)(1), Pruzinsky's motion is outside the one year limit allowed under Rule 60(b)(1) because the Order allowed a contested claim against the estate. See Fed. R. Bankr. Proc. 9024. Further, Fed. R. Bankr. Proc. 9006(b)(2) prohibits enlargement of time for taking action under Rule 9024. Thus, relief under clause (b)(1) is outside the authority of the Court.

However, the Court is concerned, not simply because Pruzinsky was possibly mistaken as to the adequacy of his suggested correction, but that the Order as eventually presented and signed did not fully and properly reflect the intent of the Court, if there is the inconsistency noted. The Court specifically stated that the words "and/or her husband Jerry Pruzinsky" were to be excised from the Order and they were not.

> [The Sixth] Circuit adheres to the view that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. A claim of strictly legal error falls in the category of "mistake" under Rule 60(b)(1) and thus is not cognizable under 60(b)(6) absent exceptional circumstances.... [C]ourts may employ subsection (b)(6) as a means to achieve substantial justice when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. ... [T]he trial court's discretion []is "especially broad" given the underlying equitable principles involved.

Honner v. Euclid Manor Nursing Home. Inc., 867 F.2d 291, 294 (6th Cir. 1989) (citations omitted).

This Court believes that the fact that the Order failed to give effect to the Court's intent is "exceptional or extraordinary," and provides the "something more" than mere mistake on the part of counsel. As such, Pruzinsky may be entitled to relief under Rule 60(b)(6). Giannetti argues against such relief because he alleges that he has relied on the Order and went forward in investing "millions" developing the property, which is near final approval by the city of Sterling Heights. Initially, the property was thought to have substantial environmental problems such that it was of minimal value. That concern proved to be wrong, and Giannetti claims that Pruzinsky wishes to take advantage of this fact and share in the consequent increased value. However, for purposes of determining Pruzinsky's contingent lien, as the Court understands it (although this is for the state court to determine), the relevant value is the value at the time of the 1994 Wayne County Settlement Agreement, not any subsequent or current value. Furthermore, no one can (or does) here argue that the Order, as entered and without any need for modification or clarification, by the terms of its fourth paragraph, in affect excluded Pruzinsky's contingent lien from being released, discharged or voided. Thus,

whatever Giannetti did thereafter, he did in face and with full knowledge of that unreleased, undischarged and unvoided lien. The Court does not understand how he can possibly now argue that he is or was somehow prejudiced by the very existence of something that the Court Order under any circumstances preserved. Indeed, the most glaring inconsistency appears to be in Giannetti's acknowledgment at the March 27, 1998 hearing before this Court that Pruzinsky took no part in any negotiations between the trustee and Giannetti and had not agreed to relinquish his rights to the contingent lien, and Giannetti's subsequent position in state court that the Order discharged any rights that Pruzinsky had under the Wayne County Settlement Agreement.

Giannetti also argues laches and that seventeen months passed before Pruzinsky took any action in state court, and nineteen months before he filed the Motion to Clarify with this Court. The Rule requires that subsection (b)(6) motions "be made within a reasonable time." Giannetti countered Pruzinsky's explanation that he was waiting for a determination of Debtor's discharge by noting that she was denied a discharge effective August 28, 1997, by notice dated March 11, 1998. However, the Court must distinguish between any delay in Pruzinsky's renewed pursuit of enforcing the Wayne County Settlement Agreement, and any delay in his request for relief in this court from operation of the Order of this Court. The Court is not convinced that, for purposes of modifying the Order, the time for Pruzinsky to take action began to run from the time the Order was entered. Instead, the Court believes that the "reasonable time" period began when the issue arose, which was in September, 1999, when Giannetti raised the Order as a defense to Pruzinsky's attempt to enforce the Wayne County Settlement Agreement as to him. Prior to that, Pruzinsky either reasonably believed that his rights were in no way effected by the settlement agreement between Giannetti and the trustee or there were other good reasons why he did not pursue the state court matter sooner, Pruzinsky arguably had no reason to question that he was free to pursue his claim against Giannetti, until Giannetti raised the collateral estoppel issue in the state

court, according at least to die clearly stated intent of the Court and indeed the fourth paragraph of the Order. Thus, Pruzinsky was first alerted in September that the Order did not state what was intended, and, through separate bankruptcy counsel, filed his motion in this court in November. The Court concludes that Pruzinsky acted within a reasonable time to request relief from the Order, and is entitled to relief under Rule 60(b)(6).

The sum and substance of the matter is that either (1) the third paragraph of the Order should be construed as not pertaining to the contingent lien and the valuation process bound up with that lien, or (2) if the parties and any other interested persons or any other court wishing to understand the purport and meaning of the Order need clarification, that clarification is that the Order should be construed as having preserved to Pruzinsky his referred to contingent lien, together with whatever obligation that might arise under Paragraph 15 of the Wayne County Settlement Agreement, which that contingent lien was there designed to secure. The amount, if any, of any such obligation or any other defenses thereto, is for the state court to determine - the purpose of this opinion being solely to make clear that the Order of this Court should not itself be construed to preclude that process from going forward.

IT IS SO ORDERED.

Dated:

Walter Shapero United States Bankruptcy Judge

cc: Richard F. Fellrath
615 Griswold, Suite 600
Detroit, MI 48226

Jerry L. Watson
1520 North Woodward Ave., Suite 106
Bloomfield Hills, MI 48304

Footnotes

fn1Pruzinsky is represented by separate counsel in the circuit court proceeding.

fn2At the conclusion of the hearing, the Court requested that the parties provide a copy or the default judgment and the Wayne County Settlement Agreement. In addition to providing these, Pruzinsky has submitted documents relating to the status of Giannetti's development of the property. As the Court did not provide for post-hearing submissions, except for the indicated documents, the Court has not considered anything other than what it requested.

No.00-CV-71346-DT

UNITED STATES DISRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: ANNA MARIE WALTER, Debtor.

JERRY PRUZINSKY,
Defendant-Appellant,

v.

SILVIO GIANETTI, ET AL.,
Plaintiffs-Appellees.

August 15, 2000 filed

AMENDED* ORDER REVERSING THE
MARCH 6, 2000 ORDER OF THE
BANKRUPTCY COURT

This appeal from the Bankruptcy Court challenges that court's use of the "residual" clause of Rule 60(b), Fed. R. Civ. Pro. 60(b)(6), to modify and grant relief from its own order, nineteen months after the original order was entered. This Court exercises jurisdiction of the appeal under 28 U.S.C. § 158, and REVERSES the decision of the Bankruptcy Court, for the reasons that follow.

FACTS

A. Background

The debtor, Anna Marie Walter, was formerly married to Jerry Pruzinsky, Appellee here. Prior to debtor's filing of her bankruptcy petition, Gianetti, Appellant here and the debtor's father, obtained a default judgment against Walter and Pruzinsky in Wayne County Circuit Court for approximately

$629,400. Giannetti's complaint in state court alleged that Walter and Pruzinsky had embezzled funds belonging to several of Giannetti's companies. The parties entered into a settlement agreement in satisfaction of that judgment (the "Wayne County Agreement"). Under the terms of that agreement, debtor and Pruzinsky quit claimed their interest in certain real property to Giannetti. The agreement further provided that each side retained a contingent lien. The property was to be appraised. If the value of the property exceeded the amount of the debt owed to Giannetti, he was to refund the difference to Walter and Pruzinsky. Conversely, if the property's value were insufficient to satisfy the debt, Giannetti was to have a lien on their other property. These liens were recorded in the Wayne County Register of deeds.

The Wayne County Circuit Court entered an order on December 6, 1994 incorporating the Wayne County Agreement. Prior to the completion of the valuation process called for in the agreement, Walter filed her bankruptcy petition in this Court, automatically staying any proceedings against her in the Wayne County action. Walter and Pruzinsky were apparently divorced at the time Walter filed her petition.

Giannetti filed a claim against Walter's bankruptcy estate for the unsatisfied judgment in Wayne County. The trustee reached an agreement with Giannetti to settle the claim. (The federal Agreement). Pruzinsky took no part in the negotiation of this agreement, and was not a party to it. He objected to the proposed order settling the claim, and Bankruptcy Judge Walter Shapero, agreeing with Pruzinsky's objections, modified the order before signing it on April 20, 1998. In November, 1999, Pruzinsky filed a motion in the bankruptcy court seeking "clarification" of the April, 1998 order. Judge Shapero, relying on Fed. R. Civ. Pro. 60(b)(6), amended the 1998 order by order dated March 6, 2000. Giannetti appeals from this last order, claiming that the Bankruptcy Court misapplied Rule 60(b)(6), which does not authorize the relief granted. The dispute centers on whether Pruzinsky's contingent lien, granted by the Wayne County Agreement, survived the Federal Agreement.

B. The Original Bankruptcy Court Proceedings

The Federal Agreement called for Giannetti to relinquish all rights under the Wayne County Agreement and to accept the Federal Agreement as full satisfaction and discharge of the Wayne County settlement. In return, he was granted a secured claim of $100,000 against the bankruptcy estate. Giannetti and the Trustee incorporated the Federal Agreement in a proposed order, and the Trustee applied to the Bankruptcy Court for permission to enter into the proposed settlement. Pruzinsky, also a creditor of the estate, objected. His written objection read in full as follows:

> Now comes Jerry Pruzinsky, creditor in the above captioned matter and objects to the entry of the proposed order approving settlement and particularly the final paragraph of the same for the reason that this paragraph seeks to adjudicate matters not before this Court (a dispute between these parties which is pending in the Wayne County Circuit Court #92-230961-CK).

The proposed order read in relevant part as follows (the parties and the Bankruptcy Court refer to these two paragraphs as paragraphs three and four):

> It is further ordered that the Wayne County Circuit Court Default Judgment obtained by Claimants against Debtor Anna Marie Walter and her ex-husband, Jerry Pruzinsky, . .as well as a certain Settlement Agreement Order of the Wayne County Circuit Court. . . are hereby satisfied and forever discharged.
>
> It is further ordered that any contingent liens by the Debtor and/or her ex-husband Jerry Pruzinsky, arising under the Wayne County Settlement and Order. . . as (sic) hereby released, discharged, and void.

At a hearing on March 27, 1998, the Court heard Pruzinsky's objections to the Federal Agreement.

The Court first attempted to clarify what the objection was, before delving into the reasons for it. The following colloquy took place:

> THE COURT: Well, we're talking now about the last paragraph only of the proposed order; am I right, Mr. Fellrath?
>
> MR. FELLRATH: That's correct. We do not object to the settlement for $100,000, which would give the creditor a $100,000 claim against the estate. We do not object to that.
>
> THE COURT: All right.
>
> MR. FELLRATH: What we object to is the language in that order which — the proposed order, that Mr. Gianetti (sic) - the claims of Mr. Preczensky (sic) against Mr. Gianetti are released, discharged and void...
>
> THE COURT: If the words "and/or her ex-husband, Jerry Preczensky" (sic) - so I understand what you're saying - were eliminated from the order, would that solve your problem?
>
> MR. FELLRATH: Yes, your honor. The — the - the reference to my client should he deleted from that portion of the order.
> THE COURT: All right. Specifically, would that do the trick from your perspective?
>
> MR. FELLRATH: Yes. Yes.
>
> THE COURT: So that's what you're concerned about?

MR. FELLRATH: That's what I'm concerned about.

Transcript 3/27/1998 at 8-9.

After hearing from counsel for the Trustee and for Mr. Gianetti, the Court heard counsel for Mr. Pruzinsky on the basis for the objection. Counsel for Pruzinsky contended that he had not taken part in the negotiations leading up to the federal agreement, that he was engaged in ongoing litigation with Mr. Giannetti, and that while he was attempting to effect a "global" settlement to his disputes with Mr. Gianetti the contingent lien from the Wayne County Agreement was a "chip" he had not yet bargained away. See Transcript of 3/27/1998 hearing, at 11-12. Counsel for Mr. Giannetti and for the estate both conceded (Tr. at 13) that they did not involve Mr. Pruzinsky in the negotiations for the settlement.

The Bankruptcy Court concluded that it could not sign an order "includ[ing] language in there which, in effect, gives up rights, frankly." Id. The Court therefore held that it would sign a modified order, excising "the language I was talking about, the words 'and/or her ex-husband Jerry Preczensky' (sic)." Counsel for the trustee then stated that he would present the modified order for entry. The modified order was presented to and signed by the Bankruptcy Court on April 20, 1998. Counsel for Mr. Gianetti, Mr. Pruzinsky, and the Trustee had all signed the order under the endorsement 'Approved as to form and content."

The modified order struck the reference to Mr. Pruzinsky from the fourth paragraph of the order, but not the third. Thus, the fourth paragraph of the order did not purport to destroy Mr. Pruzinsky's contingent lien arising from the Wayne County Agreement. The third paragraph, however, still stated that the Wayne County Default Judgment and the Wayne County Agreement were "satisfied and forever discharged." The reference in that paragraph to Mr. Pruzinsky had not been deleted.

Subsequently, in August, 1999, Pruzinsky filed subpoenas in Wayne County Circuit Court to determine the

value of the property included in the Wayne County Agreement as of 1994, the time the property was transferred. Gianetti raised the April 20, 1998 order of the Bankruptcy Court as a defense, contending that the provisions of that order which declared the Wayne County Agreement "satisfied and forever discharged" barred Pruzinsky from pursuing any claims against Giannetti arising from that Agreement. The Circuit Court, apparently agreeing with Giannetti, adjourned all motions.'

Pruzinsky then filed a "Motion to Clarify' the April 20, 1998 order with the Bankruptcy Court, contending that the April 20, 1998 order did not bar his action in Wayne County and seeking an order from the Bankruptcy Court to that effect.

D. The March 6, 2000 Order of the Bankruptcy Court

The Bankruptcy Court construed Pruzinsky's Motion to Clarify as one seeking relief from judgment pursuant to Fed. R. Bankr. Pro. 9024 and Fed. R. Civ. Pro. 60(b). Pruzinsky argued that he was entitled to relief under Parts (1), (4), and (6) of Rule 60(b). After a hearing, the Bankruptcy Court concluded that Rule 60(b)(1), regarding mistake, did not apply, because motions under that section are subject to a strict one-year time limit that Pruzinsky did not meet. Similarly, the Court concluded that 60(b)(4), relating to void judgments, also did not apply. The Court did find, however, that the residual clause, Rule 60(b)(6) applied in this case. The Court acknowledged Sixth Circuit precedent holding that part (6) of Rule 60(b), on the one hand, and parts (1)-(5) of that rule, on the other, were mutually exclusive, so that "something more" than those grounds needed to be present to grant relief to Pruzinsky.

The Court concluded that "something more" was present in this case. Specifically, the Court held that the failure of the Order to give effect to the Court's intent was "exceptional or extraordinary" and provided the "something more" required to trigger application of Rule 60(b)(6). Thus,

the Court held as follows:

> The sum and substance of the matter is that either (1) the third paragraph of the Order should be construed as not pertaining to the contingent lien and the valuation process bound up with that lien, or (2) if the parties and any other interested persons or any other court wishing to understand the purport and meaning of the Order need clarification, that clarification is that the Order should be construed as having preserved to Pruzinsky his referred to contingent lien, together with whatever obligation that might arise under paragraph 15 of the Wayne County Settlement Agreement, which that. contingent lien was there designed to secure. The amount, if any, of any such obligation or any other defenses thereto, is for the state court to determine - the purpose of this opinion being solely to make clear that the Order of this Court should not be construed to preclude that process from going forward.

Order of March 6, 2000, at 10. Contending that Rule 60(b)(6) does not apply in these circumstances, Giannetti brings this timely appeal.

A. Jurisdiction and Standard of Review

Appeals from final judgments, orders, and decrees of the Bankruptcy Court lie to the district court for the district in which the Bankruptcy Court sits. 28 U.S.C. § 158. This Court reviews the Bankruptcy Court's factual findings for clear error, but revisits its legal conclusions de novo. See In re Rembert, 141 F.3d 277, 280 (6th Cir. 1998). This case presents a pure question of law: whether, on agreed facts, the Bankruptcy Court correctly applied Fed. R. Civ. Pro. 60(b)(6)fn2 to grant relief to Pruzinsky from its Order of April 20, 1998. A de novo review is thus appropriate.

B. Rule 60(b)

Rule 60(b) provides that "on motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, [or] order - . for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect;. . .(4) the judgment is void; (5) the judgment has been satisfied; . . .or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

A motion made under Rule 60(b)(6) "is addressed to the trial court's discretion which is especially broad given the underlying equitable principles involved." Hopper v. Euclid Manor Nursing Home, Inc, 867 F.2d 291, 294 (6th Cir. 1989) (internal quotations and citations omitted). While "especially broad," the trial court's discretion in applying the rule is not unbounded. The Sixth Circuit "adheres to the view that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." Id. A claim of strictly legal error is a claim of "mistake" governed by Rule 60(b)(1), and is thus not cognizable under Rule 60(b)(6). District courts may use subsection 60(b)(6) to achieve substantial justice when "something more" than one of the grounds listed in the first five clauses is present. Id.

There are few cases elaborating on the "something more" that is required. This may be explained, as the Sixth Circuit has postulated, by the fact that clauses 1-5 of the Rule cover almost every conceivable ground for relief See Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990). The "something more," then, must include unusual or extreme situations where principles of equity mandate relief. The question in this case is whether such equitable circumstances are present.

Appellant argues that the claim of error made by Pruzinsky is one of garden variety mistake. The legal document involved here was relatively brief. The language

was clear. Any mistake was made by counsel for Pruzinsky and adopted by the bankruptcy judge at his request.

Pruzinsky objected, specifying that the final paragraph of the proposed order purported to destroy his contingent lien on Giannetti's property, despite the fact that he had not consented to relinquish that lien, Pruzinsky couched that objection repeatedly as being to the final paragraph only, and the Bankruptcy Court accordingly focused its attention there. Pruzinsky did not deal with the third paragraph which, by declaring the Wayne County Agreement satisfied and discharged, might also have the effect of destroying the contingent lien (i.e., by preventing the contingency triggering the lien - valuation of the property - from ever Coming to pass). The Bankruptcy Court dealt with Pruzinsky's objection; it was not the obligation of the Bankruptcy Judge to peruse and rewrite the entire document.

Counsel for Pruzinsky, in reality, recognizes that the April 20,1998 order embodied a mistake. The Bankruptcy Judge's on-the-record discussion, that he could not endorse an agreement terminating Pruzinsky's rights when Pruzinsky had arguably not been involved in negotiating the agreement (and objected to it), was inconsistent with the Order which did not address the third paragraph. This order of the Bankruptcy Court, in view of its discussion of the issue at the hearing on March 27, 1998 (at p. 13) was, in that Court's view, more than a mistake - "something more" that justified the extraordinary relief granted in the March 6, 2000 order.

This Court disagrees with that conclusion. The April 20, 1998 order of the Bankruptcy Court conformed to the request of Pruzinsky's counsel and to the specific oral holding of Judge Shapero, which was that the words "and/or her ex-husband, Jerry {Pruzinsky} be excised from the proposed order. Those exact words occurred only once in the proposed order - in the final paragraph - and they were deleted there. The third paragraph was never mentioned at the hearing. That paragraph contained similar but not identical words - "or" was missing from that paragraph's version of the

offending phrase. Thus, the April 20, 1998 order specifically conformed to Judge Shapero's holding.

The mistake places the case squarely within Rule 60(b)(1) To the extent that extinguishing Pruzinsky's rights, despite his lack of involvement in the settlement negotiations, constituted legal error, that too falls under Rule 60(b)(1). The case is governed by Rule 60(b)(1), and subject to its strict one-year time limit for the filing of a motion for relief from judgment. Because Pruzinsky's motion was filed some nineteen months after the order from which relief was sought, the Bankruptcy Judge had no discretion to grant the relief he did in the March 6, 2000 order.

In essence, counsel for Pruzinsky wants this Court to affirm the Bankruptcy Judge's latest order, that, without Appellant's approval, rewrote the contract as effectuated by the mutually agreed upon Bankruptcy Court order. It is not the Court's role to rewrite a contract.

Finally, Pruzinsky's alternative argument that Rule 60(b)(4) applies because the Apr11 20, 1998 order was void, is without merit, for the reasons given by the Bankruptcy Court.

REVERSED.

LET JUDGMENT ENTER ACCORDINGLY.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Detroit, Michigan

Footnotes

*The Court's original order was filed with page 10 inadvertently omitted. This amended order corrects that oversight; there is no substantive change.

fn1The parties' briefs do not reveal the exact nature of

the Wayne County Circuit Court's order adjourning the motion That is, it does not appear on the record whether the Wayne County Circuit Court agreed with Giannetti's defense on the merits, or was simply holding the matter in abeyance pending clarification from the Bankruptcy Court on the scope of its 4/20/1998 order.

fn2Fed. R. Bankr. Pro. 9024 makes Fed. R Civ. Pro. 60 applicable to cases under the Bankruptcy Code, generally giving bankruptcy judges the discretion available to district judges under that rule. See Olle v. Henry & Wright Corp., 910 F.2d 357, 363 n.5 (6th Cir. 1990).

00-2075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ANNA MARIE WALTER, Debtor.

JERRY PRUZINSKY,
Defendant-Appellant,

v.

SILVIO GIANETTI, ET AL.,
Plaintiffs-Appellees.

April 25, 2002, Filed

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Nelson would grant rehearing for the reasons stated in his dissent.

(2)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 02-0141

In The

Supreme Court of the United States

SILVIO GIANNETTI;
GIANNETTI INVESTMENT COMPANY,

Petitioners,

v.

JERRY PRUZINSKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Respondent Jerry Pruzinsky ("Pruzinsky") was married to Anna Marie Walter on May 7, 1968. They operated petitioner's apartment complex for many years. Petitioner Silvio Giannetti ("Giannetti") sued his daughter for misappropriation of certain trust funds and included Pruzinsky in the suit for other alleged defalcations. A default judgment was entered against Pruzinsky October 25, 1993. On December 6, 1994, the parties entered into a settlement whereby Pruzinsky turned his pension and his interest in stock in Giannetti companies over to Giannetti and dismissed his appeal of the judgment. The settlement provided for the valuation of the turned over assets and entry of judgment by the court whether for or against Giannetti in accord with the valuation of the assets.

In the interim, the debtor Ann Marie divorced Pruzinsky (taking with her all joint assets consisting of the residence and a bar, Pruzinskys, Inc.), married a patron of their bar, and filed for protection under Chapter 11 of the Bankruptcy Code.

Litigation ensued in the Bankruptcy Estate with Giannetti actively opposing all actions favorable to Pruzinsky and appealing every decision in Pruzinsky's favor.

This dispute concerns Giannetti's claim in the Bankruptcy Estate in which Pruzinsky was not a party and did not participate in the negotiations (see JA 86). The objection found at R 306, JA 70 ensued. At the hearing, Judge Shapero asked, "How can – how can the debtor and yourself, between the two of you eliminate Mr. Pruzinsky's rights?" The Court continued, "All right so I don't see how I can include language in there which, in effect, gives up rights, frankly. So I will sign an order that excises from

the proposed order the language I was talking about, the words: and/or her ex husband Jerry Pruzinsky I'll sign that order." JA at 114, 117.

As pointed out in Giannetti's brief, there was some confusion over the language of the order. On motion to clarify, Judge Shapero found that the order presented did not reflect his ruling and granted Pruzinsky's motion for reformation in according with his stated ruling (above). Judge Shapero relied upon Fed. R. Civ. P. 60(b)(6) and, indeed, some textual and case law did support the position. See Ano, Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Judgment or Order for any other Reason, 15 ALR Fed. 193. "Errors or omission in the judicial process, . . . by the trial judge . . . may be the bases of relief under Rule 60(b)(6)." See e.g., *Bank of Montreal v. Olafsson*, 648 F.2d 1078 (6th Cir. 1981); *Hand v. U.S.*, 441 F.2d 529 (5th Cir. 1971) and *Central Cartage v. Fewless*, 232 Mich. App. 517 (1998). See P. 14 Final Brief of Appellant, 6th Circuit Court of Appeals.

The trend of the case law seems to have changed the section under which courts should reform their orders to state their intentions. As noted in note one of the Pruzinsky appeal to the District Court.

> Some authorities hold that the authority to revise a judgment to reflect the Court's intention is properly brought as correcting an error pursuant to Fed. R. Civ. P. 60(a). See 12 Moore's Fed. Practice (3rd Ed.) 60.11 [2][b]. In either case, the test is the court's expressed intention at the time the original judgment is entered. See for example *Robi v. Five Platters*, 918 F.2d 1439, 1445 (9th Cir. 1990), change in the number of trademarks

affected, *Blanton v. Anzalone,* 813 F.2d 1574, 1577 N3 (9th Cir. 1987) to delete award of pre-judgment interest, *In re Marc Rich & Co. AG,* 739 F.2d 834, 836-7 (2nd Cir. 1984), to the same effect. See also language in *In re Frigitemp Corp.,* 781 F.2d 324, 327 (2nd Cir. 1985) where the court found that the order reflected the jury's position which made no reference to interest.

As noted in respondent's brief, movant never relied upon this order but since 1995 has pursued the subdivision of the property. JA 82, 83.

REASONS NOT TO GRANT CERTIORARI

28 U.S.C. § 1254(1) provides that review of Court of Appeals decision is by writ of certiorari.

Rule 10 of this Court provides the following concerning Certiorari from the Courts of Appeals.

Since there are no conflicting Court of Appeals decisions and no conflict with a State Supreme Court decision, the only grounds would appear to be that the decision appealed from has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. A review of textural material concerning departure from usual course of "Judicial Proceedings" (13 Moore's Federal Practice § 810.27) indicates that while this court is in complete control of its own docket that certiorari is generally granted in those instances where (A) the court exercises a

writ in circumstances not normally exercised by that court,[1] or (B) would change criminal procedure,[2] (C) or to clarify boundaries of jurisdiction of a lower court.[3] Reaching back to affirm an oral statement, even if improper, does not rise to this level. In short, there does not appear to be compliance with Rule 10 by the petitioner.[4]

Respectfully submitted,

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---

[1] Mandamus by the court of Appeals *Thermtron Products Inc. v. Hermansdorfer,* 423 U.S. 336, 965 S. Ct. 584, 46 L. Ed. 2d 542 (1976).

[2] *McNabb v. U.S.*, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

[3] *New York City Transit Auth. v. Beager*, 446 U.S. 568, 995 S. Ct. 1355, 59 L. Ed. 2d 587 (1979).

[4] Note: The cases dealing with Bankruptcy procedure such as *Northern Pipeline Const. Co v. Marathon Pipeline Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S.Ct. 2858 (1982) have generally limited that court's jurisdiction over non parties in the same way Judge Shapero did in the instant case.